

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEN VANREYENDAM,

Defendant-Appellant.

UNPUBLISHED

April 24, 2007

No. 266511

Macomb Circuit Court

LC No. 2002-003177-FC

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In November 2003, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and conspiracy to commit first-degree premeditated murder, MCL 750.157a. He was sentenced to two terms of life in prison without the possibility of parole. In a prior appeal, this Court rejected defendant's evidentiary and ineffective assistance of counsel claims, but remanded the case for further proceedings to determine under which of two immunity agreements, a 1998 written agreement or a 2001 oral agreement, the parties were operating, whether defendant breached the applicable agreement, and if so, the appropriate remedy. *People v VanReyendam*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2005 (Docket No. 254024). On remand, instead of squarely deciding which of the two agreements applied, the trial court concluded that defendant breached both agreements so his prosecution did not violate either agreement. Defendant again appeals by right. We affirm.

On remand, the trial court separately analyzed both agreements. It determined that defendant violated the 1998 written agreement, assuming it was controlling, because (1) he failed to provide complete and truthful statements about his knowledge of the homicide that was being investigated, and (2) he failed to submit to a polygraph examination. Consequently, the court determined that the prosecution was free to withdraw from the agreement and that any statements or evidence obtained from defendant were properly used against him at trial. The court also determined that defendant violated the 2001 oral agreement, assuming it was controlling. The court reasoned that a covenant of good faith and fair dealing could be implied in the oral agreement to require defendant to provide complete and truthful testimony in exchange for immunity because the agreement otherwise would have no value to the prosecution. Moreover, because the prior written agreement required defendant to provide complete and truthful statements, defendant could not claim surprise if the same requirement was implied in the oral agreement. The court also concluded that the oral agreement did not preclude any statements or

evidence obtained from defendant from being used against him at trial if the agreement was violated.

On appeal, defendant first argues that the trial court failed to strictly comply with this Court's instructions in the first appeal because it did not specifically find which of the two agreements was controlling.

"Where a case is remanded for further proceedings, the lower court may not take action that is inconsistent with the appellate court's remand order." *In re TM (After Remand)*, 245 Mich App 181, 191; 628 NW2d 570 (2001). But the trial court may take such action on remand as law and justice require that is also consistent with the appellate court's judgment. *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995) (citations omitted).

This Court's prior opinion remanded this case "for a determination of whether the parties were operating under the written or oral agreement" and instructed that "[t]he trial court should then determine . . . whether defendant breached the agreement, and if so, the appropriate remedy." *VanReyendam, supra*, slip op at 10. Remand was necessary because the trial court failed to distinguish between the two agreements when analyzing the scope and extent of defendant's immunity. Although on remand the trial court did not decide that one agreement was controlling over the other, it separately analyzed the facts under each agreement and concluded that defendant breached the terms of both agreements and was not entitled to specific performance of either agreement. The trial court's approach was consistent with this Court's prior judgment. The court considered the terms of both agreements and concluded that the result would be the same under both. We find no violation of this Court's prior remand instructions.

Defendant next argues that the 2001 oral agreement superseded the 1998 written agreement, and that the trial court erred in finding that he materially breached the terms of the 2001 agreement. In reviewing the trial court's decision, we will not disturb the court's factual findings unless they are clearly erroneous. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). We review de novo the trial court's legal conclusions. *People v Matuszak*, 263 Mich App 42, 47-48; 687 NW2d 342 (2004).

Generally, when two agreements cover the same subject matter, but include inconsistent terms, the later agreement supersedes the earlier agreement. *CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125, 130; 649 NW2d 808 (2002). In this case, the trial court did not find that the 2001 agreement superseded the 1998 agreement, but concluded that even if the 2001 agreement applied, defendant breached that agreement by failing to provide complete and truthful testimony. Thus, even if we were to credit defendant's argument that the 2001 agreement is alone controlling, appellate relief would not be warranted unless the trial court clearly erred in determining that defendant breached the 2001 agreement.

Defendant argues that the trial court improperly construed the 2001 oral agreement as containing an implied covenant of good faith and fair dealing that required him to provide complete and truthful statements. In our prior decision, this Court stated that the 2001 oral agreement consisted of the following express terms: (1) defendant was to make a statement on tape but (2) nothing defendant said on the tape would be used against him either as substantive or impeachment evidence should he be charged in this matter. The agreement did not address whether defendant was obligated to provide truthful and complete statements in order for his

statements or any evidence derived from his statements not to be used against him if he were prosecuted. *VanReyendam, supra*, slip op at 8-9.

As this Court explained in its previous decision, the government may informally grant a suspect immunity in exchange for his cooperation. *United States v Pelletier*, 898 F2d 297, 301 (CA 2, 1990). These types of nonprosecution agreements are interpreted using ordinary contract principles, but also with heightened judicial discretion to ensure that the ends of justice are being served by enforcing such agreements. *People v Lombardo*, 216 Mich App 500, 510; 549 NW2d 596 (1996); see, also, *United States v Andreas*, 216 F3d 645, 663 (CA 7, 2000).

On remand, the trial court properly applied contract principles to determine the scope of the 2001 oral agreement. The court relied on *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992), for the rule that “the covenant of good faith and fair dealing is an implied promise contained in every contract.” The covenant provides, “that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Id.* at 152, quoting *Fortune v National Cash Register Co*, 373 Mass 96, 104; 364 NE2d 1251 (1977). The trial court further concluded, “an immunity agreement in exchange for information would have no value without an implied term of complete and truthful statements.” The court then concluded that defendant breached the terms of the 2001 agreement by providing the same false information and misleading statements that he had given previously pursuant to the 1998 written agreement.¹

Defendant argues that the trial court improperly implied a covenant of good faith and fair dealing as part of the 2001 agreement because doing so contradicts its express terms. We agree with defendant that an implied term may not be used to replace or contradict an express term of a contract. See *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994) (“A lack of good faith cannot override an express provision in a contract.”). But defendant has not shown that an implied covenant of good faith and fair dealing contradicts any express term of the parties’ agreement. Rather, the oral agreement is silent regarding whether defendant was required to provide complete and truthful statements. Because the agreement does not address any obligation to make complete and truthful statements, implying such an obligation does not vary or contradict any express terms of the agreement.

We conclude that the trial court did not clearly err in determining that the 2001 oral agreement included an implied obligation to provide complete and truthful statements in exchange for immunity. Because there is no dispute that defendant failed to provide complete and truthful statements about his knowledge of the crime, the trial court properly determined that he breached the agreement and that his statements, and any evidence derived from them, could be used against him at trial. Cf. *United States v Macchia*, 861 F Supp 182 (ED NY, 1994), appeal dismissed on other grounds 41 F3d 35 (1994) (a defendant’s untruthful statements given pursuant to an immunity agreement were grounds for abrogating the defendant’s immunity, even

¹ As the trial court noted, defendant cannot claim that his obligation to provide complete and truthful statements was unexpected, considering that the former 1998 written agreement expressly required complete and truthful statements.

though the agreement was silent on the effect of a breach). This conclusion is consistent with public policy that supports implying a requirement of complete and truthful statements in order to enforce an immunity agreement. See *People v McIntire*, 232 Mich App 71, 89-91; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999).²

Defendant also argues that the trial court also erred in finding that he breached the 1998 written immunity agreement. We disagree.

The trial court found that defendant violated the 1998 agreement by not providing complete and truthful statements about his knowledge of, and involvement in, the 1994 shooting death of Edward McMahon, and further, by refusing to submit to a polygraph examination.

Defendant argues that he did not materially breach the 1998 agreement because he furnished sufficient information to allow the prosecutor to obtain convictions of the shooter and others involved in the crime. The prosecution argues that defendant materially breached the agreement by significantly downplaying his relationship with Johnson, Mitchell, and Messina, and also by falsely denying his significant and pivotal role in the crime.

In *United States v Fitch*, 964 F2d 571, 574 (CA 6, 1992), the court approved the following statement in *United States v Castelbuono*, 643 F Supp 965, 971 (ED NY, 1986) regarding an immunized witness's statement or testimony:

“Although an inadvertent omission or oversight would not rise to the level of a materially false statement so as to constitute a breach of the agreement, a bad faith, intentional, substantial omission . . . does constitute a materially false statement and thereby a breach of the agreement.”

In *United States v Castaneda*, 162 F3d 832, 837-838 (CA 5, 1998), the court defined a material breach by whether the defendant substantially performed under the terms of a non-prosecution agreement requiring full and truthful disclosure:

Courts within this Circuit have clarified the concept of material breach by comparing it with the converse concept of substantial performance. Using this approach, if a party's “nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance,” the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission. We think that this approach is

² Defendant's reliance on *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999), to support a contrary argument is misplaced. In *McIntire*, the Supreme Court held that this Court erred in ruling that an obligation to provide truthful answers was an implicit condition of a judicial grant of immunity under MCL 767.6, because that statute then contained no requirement for truthful testimony. We agree with the trial court that this case is distinguishable because it involves an informal immunity agreement, not a statutory grant of immunity. We also note that after *McIntire* was decided, MCL 767.6 was amended by 1999 PA 250 to now require truthful testimony in order to be entitled to the statutory immunity.

equally applicable in determining the materiality of a breach in the context of nonprosecution agreements. [Citations omitted.]

In addition to applying contract principles, we must take into account whether the ends of justice are served in this case by enforcing the agreement. *Lombardo, supra*.

The trial court did not clearly err in finding that defendant failed to provide “complete and truthful” information as required by the agreement. Testimony at the evidentiary hearing indicated that defendant consistently portrayed himself as a mere witness rather than a coconspirator or active participant, as later information revealed. Although he identified others involved in the offense, he provided only vague information and details during the 1998 investigation and failed to disclose information about other suspects in order to minimize his own involvement. It was only through further investigation of other witnesses that the police learned of defendant’s extensive involvement in the offense. Defendant’s substantial and intentional omissions about his knowledge of, and involvement in, the offense cannot be considered inadvertent or innocent. Therefore, the trial court did not clearly err in finding that defendant breached the 1998 agreement by failing to provide complete and truthful information.

We also reject defendant’s argument that he did not breach the polygraph requirement of the 1998 agreement because he was never asked by the prosecutor to submit to a polygraph examination. Although it is undisputed that defendant twice failed to appear for a polygraph examination scheduled by the police, defendant maintains that the 1998 agreement only required him to submit to a polygraph examination at the request of the prosecutor, not the police. This argument lacks merit. The record discloses that an assistant prosecutor sought to have defendant submit to a polygraph examination, but left it to the police to schedule and conduct it. Two examinations were scheduled, but defendant did not appear for either. Thus, the trial court did not clearly err in finding that defendant breached this requirement.

Defendant also argues that it was improper for the trial court to declare the 1998 agreement null and void because the agreement specifically provided that it could be declared null and void only if “the result of the polygraph examination or conversation with the polygraph examiner indicate that Mr. VanReyendam has not been truthful.” It was defendant’s failure to submit to a polygraph examination that prevented the fulfillment of this requirement. Defendant expressly agreed to submit to a polygraph examination upon request; he breached this portion of the agreement. By failing to comply with the terms of the agreement he voluntarily struck, defendant loses the benefit of the bargain, i.e., immunity. Accordingly, the trial court did not err in concluding that the agreement was null and void.

Next, defendant argues that this Court should decline to follow its prior determination that this case is not governed by *Kastigar v United States*, 406 US 441; 92 S Ct 1653; 32 L Ed 2d 212 (1972). See *VanReyendam, supra*, slip op at 4-5. Defendant now asks this Court to revisit this issue, notwithstanding the law of the case doctrine. We decline to do so.

The law of the case doctrine provides: “[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *Fisher, supra* at 444-445, quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). Nonetheless, the law of the case

doctrine is not inflexible, and in a criminal case a court may decline to apply it where to do so will work an injustice. See *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994). Also, the doctrine will not be followed if the facts are no longer materially or substantially the same or if there has been a change in the law. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). Here, the facts have not materially changed since this Court's prior decision, nor does defendant cite any legal authority that postdates our prior decision. Finally, defendant has not shown it would be unjust to apply the law of the case doctrine.

In a pro se supplemental brief, defendant repeats most of the same issues we have already addressed. Defendant additionally argues that he did not breach the 2001 agreement by failing to appear for a polygraph examination. This was not a basis for the trial court's finding of a breach. Rather, the trial court found that only the 1998 agreement was breached for this reason, and that defendant breached the 2001 agreement by failing to provide complete and truthful statements. Thus, this issue does not warrant appellate relief.

We affirm.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey